IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CEA No.47 of 2005
Date of decision: 11.9.2006

Commissioner of Central Excise, Delhi III, Gurgaon.

...Appellant

v.

M/s Electrolus Kelvinator Limited, Gurgaon.

...Respondent

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Ms. Ranjana Shahi, Advocate, for the appellant.

JUDGMENT:

This appeal has been preferred by the revenue proposing following question of law:-

> "Whether penalty under Section 11AC is liable to be imposed on the assessee and interest under Section 11AB can be levied in those cases which fall under the purview of explanation to sub-section (2B) of Section 11A of the Central Excise Act, 1944, where duty has been deposited before issue of Show Cause Notice?"

Case of the revenue is that the assessee was clearing parts of washing machines to its own branches/service centres and such parts were being sold on actual cost of spares. Under Rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000, assessable value should be taken at 115% of the cost of goods if the goods are not sold in open market. There was short levy of excise duty. The assessee voluntarily debited the amount of short levy with interest. The assessee] was receiving inputs from small scale manufacturers by paying concessional rate of central excise duty i.e. 9.6% though the rate applicable was 12.8%. There was, thus, short levy. The assessee debited the said duty with interest voluntarily. The adjudicating authority confirmed the demand

of duty with interest and imposed penalty of Rs.1,30,301/-. The Commissioner (Appeals) upheld the view of the adjudicating authority. The Tribunal set aside the penalty holding that duty having been paid prior to issuance of show cause notice, imposition of penalty was not justified.

We have heard learned counsel for the revenue.

It is well-settled that penalty under section 11AC of the Income Tax Act, 1961 (for short, 'the Act') is leviable if the assessee has requisite mens rea. Though, mere deposit of duty short levied before show cause notice may not be conclusive but if there was no intention to evade, penalty is not attracted. Reference may be made to judgment of this court in CEA No.13 of 2005 **(Commissioner of Central Excise Delhi III v. M/s Machino Montell(I) Limited and another,** decided on 25.7.2006.

From the finding recorded by the adjudicating authority, appellate authority and the Tribunal, learned counsel for the revenue is unable to show that there was any element of mens rea on the part of the assessee. Reference may be made to judgments of the Hon'ble Supreme Court in **Hindustan Steel Limited v. State of Orissa**, AIR 1970 SC 253, wherein, it was held that element of mens rea is normally required to be shown for imposition of penalty. Same view was taken in **The Commissioner of Income Tax, West Bengal v. Anwar Ali**, AIR 1970 SC 1782. View taken by the Tribunal, in the circumstances, cannot be held to be illegal or perverse.

No substantial question of law arises.

The appeal is dismissed.

(Adarsh Kumar Goel)
Judge

Sept. 11, 2006 (Ajay Kumar Mittal)
'gs' Judge